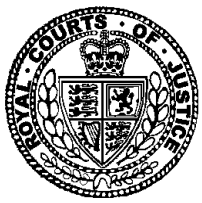

Neutral Citation Number: [2015] EWHC 2624 (TCC)

Case No: HT-2015-000239

IN THE HIGH COURT OF JUSTICE
QUEEN'S BENCH DIVISION
TECHNOLOGY AND CONSTRUCTION COURT

Royal Courts of Justice

Strand, London, WC2A 2LL

Date: 16 September 2015

Before :

MR JUSTICE STUART-SMITH

- -

Between :

ROB PURTON t/a RICHWOOD INTERIORS **Cla**

- and -

KILKER PROJECTS LIMITED **Defe**

- -

- -

Mr Robert Sliwinski (instructed by **Thomas Bingham Chambers (Direct Access)**) for the **Claimant**

Mr Jonathan Selby (instructed by **Fenwick Elliott LLP**) for the **Defendant**

Hearing dates: 29 July 2015

- -

Approved Judgment

I direct that pursuant to CPR PD 39A para 6.1 no official shorthand note shall be taken of this Judgment and that copies of this version as handed down may be treated as authentic.

.....

MR JUSTICE STUART-SMITH

Mr Justice Stuart-Smith :

Introduction

1.

This is the Claimant's application to enforce the adjudication decision of Mr Christopher Hough made on 12 May 2015 by which he ordered the Defendant ["Kilker"] to pay the Claimant ["Mr Purton"] £147,223.00 within 7 days and ordered Kilker to pay his fees and expenses of £4,184.00.

2.
Mr Purton trades in his personal capacity, either sometimes or always in the trading name of Richwood Interiors. He is also associated with at least one limited company having a name that is similar to Richwood Interiors. The dispute arises out of works carried out by Mr Purton for Kilker at the Dorchester Hotel. Mr Purton asks for summary judgment. Kilker resists that on the basis that there was no concluded contract between the parties and therefore the Adjudicator had no jurisdiction to give his decision. That was a point that Kilker took before the Adjudicator. He rejected it by a non-binding decision which is included in his overall decision. Kilker reserved its position but made submissions on the facts underlying Mr Purton's claim without prejudice to that reservation.

3.
By way of introduction, it is only necessary to add that this is the second adjudication arising out of these works. The first was started in the name of Richwood London Limited, because Mr Purton said that he had transferred his contract to that limited company. In the first adjudication, Kilker took the point that any contract had been with Mr Purton and not with Richwood London Limited. The first adjudicator accepted that submission and resigned. Mr Purton then issued the second adjudication in his own name.

The General Principles to be Applied

4.
The test to be applied when considering an application for summary judgment is vey well known and is set out at CPR 24.2. The Court must be satisfied that the Defendant has no real prospect of successfully defending the claim and that there is no other compelling reason why the case should be disposed of at a trial.

5.
The relevant principles on the formation of contracts are equally well known. One convenient summary (among many) appears at [49] of the speech of Lord Clarke in RTS Flexible Systems Ltd v Molkerei Aolis Muller GmbH & Co KG [2010] UKSC 14, which I bear in mind but do not set out again here. In a case where, as here, there is no doubt that substantial works have been carried out at the request of a party, it is important to bear in mind the guidance provided by the Court of Appeal in Percy Trentham Ltd v Archital Luxfer Ltd (1992) 63 BLR 44. At page 52, Steyn LJ said:

"The third matter is the impact of the fact that the transaction is executed rather than executory. It is a consideration of first importance on a number of levels. See British Bank for Foreign Trade ltd v Novinex[1949] 1 KB 268, at page 630. The fact that the transaction was performed on both sides will often make it unrealistic to argue that there was no intention to enter legal relations. It will often make it difficult to submit that the contract is void for vagueness or uncertainty. Specifically, the fact that the transaction is executed makes it easier to imply a term resolving any uncertainty, or, alternatively, it may make it possible to treat a matter not finalised in negotiations inessential..... Fourthly, if a contract only comes into existence during and as a result of performance of the transaction it will frequently be possible to hold that the contract impliedly and retrospectively covers pre-contractual performance. See Trollope & Colls Ltd v Atomic Power Construction Ltd[1963] 1 WLR 333."

6.
Lord Clarke noted in RTS at [54], “Steyn LJ was not saying that it follows from the fact that the work was performed that the parties must have entered into a contract. On the other hand, it is plainly a very relevant factor pointing in that direction. Whether the court will hold that a binding contract was made depends upon all the circumstances of the case, of which that is but one.”

7.
This approach may be particularly important where either (a) there is no doubt that works were agreed to be carried out and were in fact carried out but the price for those works was either not agreed or subject to future variation; or (b) where an original scope of works was agreed (with or without a price being agreed) in the knowledge that further works may be added later (either by a formal process of variation orders or less formally). In either case, where the works have in fact been carried out, the Court may readily find that there was an intention to create legal relations; and if it is concluded that there was insufficient certainty about the agreement of a price or pricing mechanism, the Court will readily infer that the person carrying out the works is entitled to be paid on a quantum meruit basis rather than reaching the more drastic position of denying the existence of a contract altogether. These principles are just as applicable in the context of a claim based upon an adjudicator’s award as in other circumstances.

8.
In this case Mr Purton says that he entered into a contract with Kilker on or about week commencing 9 June 2014 for the joinery package at the Dorchester Grill for a price of £350,000 and that the contract was subsequently varied in value, quantity and quality. He says he entered into the contract on or about week commencing 9June 2014 in the course of a conversation with Mr Brendan Kilker of Kilker. Kilker denies the existence of any such contract.

9.
On the papers it appeared that the only issue to be considered was whether Kilker has any reasonable prospect of establishing the absence of a contract. In submissions, Mr Selby for Kilker wisely shifted his ground to include a second line of defence, namely that even if there was a contract, it was not the contract that was referred to adjudication or is the subject of these proceedings and that therefore summary judgment should not be entered. It is not suggested that there is any other compelling reason why the case should go to trial.

The Factual Background

10.
The referral to adjudication asserted that an oral contract had come into existence during the week of 9 June 2014, the essential terms of which were that there was a specified list of itemised work and an agreed contract price of £350,000. It alleged that the original contract was changed in various respects both in value and in quantity and quality through various variation instructions. In his witness statement in support, Mr Purton said that he had a meeting with Mr Kilker “in the week commencing 9th June 2014” at which it was agreed that a list of items would be his scope of works for the contract and the price for those works would be £350,000.

11.
Mr Kilker denies that any such conversation took place. In his witness statement for the adjudication, he said “At no stage did Mr Purton ever say or suggest to me that the contract would be entered into with him trading as Richwood Interiors”. His evidence was supported by his project Quantity

Surveyor, Mr Jennings, who said that his understanding at all times was that a figure in the range of £550,000-600,000 had been spoken about but not finally agreed.

12.
When these proceedings were issued on the back of the adjudicator's decision, Mr Purton pleaded that he entered into the contract with Kilker "on or about" 9 June 2014, that a dispute had arisen under the contract which had been referred to adjudication and that he claimed an order enforcing the adjudicator's decision. His initial witness statement in support of his application for summary judgment referred to having entered into a contract "on or about" 9 June 2014. Mr Kilker took issue with Mr Purton, stating that "Kilker never reached an agreement with Mr Purton about his work on the Dorchester Grill, whether in the week of 9 June 2014 or at all." He denied having met Mr Purton during the week of 9 June 2014 to discuss scope or prices, though he had received an email from Mr Purton on 12 June 2014 suggesting a meeting at the Dorchester that day, which he thinks did not happen. He said that the first discussion of the figure of £350,000 was on or after 21 July 2014. In a reply witness statement, Mr Purton reiterated that a meeting had taken place during the week commencing 9 June 2014 when they had reached firm agreement on what was called the Joinery Package.

13.
Less controversially, Mr Purton says that he carried out the works on site between 22 September and the last week of October 2014, though it is apparent from the documentation that substantial preparatory steps had been taken before then, for which Mr Purton had requested and received payments from Kilker. This is now common ground, at least for present purposes.

14.
Various documents and events have been referred to in support of either side's position. Some predate the alleged contract, others come later:

i)
Mr Kilker says that he and Mr Purton met in April 2014. He says that in the course of the meeting he and Mr Purton had "looked at all the joinery elements and associated finishing details that Mr Purton would be required to carry out" and at the end of the meeting he believed "Mr Purton knew what work was required of him and that the question that remained to be answered was whether the works as detailed in the updated drawings that he took away for review could be completed for a price in the region of £550,000-600,000."

ii)
On 13 May 2014 Mr Jennings emailed Mr Purton after a meeting, in the course of which he wrote:

"**Overall Budget**:

The overall budget that you are working to is £550,000-600,000 & VAT. This is the budget based on the original scope of works and we confirm that the latest agreed set of drawings issued by Bruno Moinard in April 2014 has changes to the base scheme.

Additional Works

[…]

Richwood Interiors are to produce a list of items that are extra to the £550k with their respective extra over costs to the project so that Kilker Projects can advise the client accordingly of potential extra costs.

[…]

Deposit Payments:

I appreciate you are forking out money on deposit payments as the French companies do not lift a finger until generally 50% deposits are paid – as discussed we will need to get a payment to you by the end of this week to keep up to speed with the money you are expending.

[…]";

iii)
On 20 May 2014 Mr Purton sent an invoice for "Further application for works completed for the Dorchester" in the sum of £100k plus VAT;

iv)
On 22 May 2014 Mr Purton sent a statement of account identifying payments of £124,000 plus VAT against a debit owed of £144,000 plus VAT and claiming £20,000;

v)
The contract is alleged to have come into existence on or about week commencing 9 June 2014;

vi)
The email on 2 June 2014 from Mr Purton to Mr Kilker was timed at 13:06 and said "I am leaving Devon now can I meet you at the hotel at 4.45 today Best Rob". Mr Kilker says in his witness evidence that such a time would have been inconvenient for him as a result of his family commitments;

vii)
On 24 June 2014 Mr Purton sent a document which appears on its face to have two component parts. The upper half records works done to the value of £125,000 and payments of £120,000 (both net of VAT). Underneath that part are the words: "Contract price – to be agree [sic] with Brendan £550,000-600,000". Below those words appears "Valuation 02 - £100,000" plus VAT.

viii)
On 16 July 2014, Mr Purton sent an application for payment of £150,000 plus VAT (i.e. £180,000 gross) which is endorsed in handwriting with the statement that Kilker paid 5 instalments between 17 July and 8 August 2014 totalling £170,000 gross;

ix)
On 18 July 2014, Mr Jennings sent an email in which he said:

"As discussed earlier please find attached an excel work sheet to use as your application for payment.

The figures will alter to reflect the agreements between yourself & Brendan and what I really want is your application for payment to reflect;

•
The original agreed contract value

•

The agreed costs of variations to the original scope of works

•
The value of money claimed for each calendar month so we can track what money is owed & due for payment

If you want to alter the format so that you provide more information then please feel free to do so."

The template spreadsheet was entitled "Application for Payment No 3 To end of June 2014". The left-hand column was headed "Original Contract Works" and listed 13 items (under sub-headings for preliminaries and joinery manufacture), each of which had a "Total Value" given in the second column. The Total Value of the 13 items was £550,000. Continuing down in the left hand column were three further items under the heading "Additional Works/Variations", the Total Values of which amounted to £42,000 giving an overall total of £592,000. To the right of these columns were further columns setting out the % completion for each item and the sum claimed in respect of the completed work, the amounts claimed previously (in this document appearing as nil) and the valuation derived from the preceding columns;

x)
On 21 July 2014, Mrs Ronnie Pegg, Mr Purton's administrator, sent Kilker an application for payment by Kilker of £150,000 setting out that costs of £363,164 had been incurred by Mr Purton, of which £211,024 had been paid by Mr Purton and £152,140 was outstanding. It recorded that Mr Purton had received £153,333 to date from Kilker. Mrs Pegg did not use the template that had been provided on 18 July. At the end of the email, Mrs Pegg wrote "NB We are aiming for a contract price of £600,000 with £50,000 aborted costs";

xi)
On 28 July 2014 Mr Purton submitted a further invoice claiming payment of £150,000 plus VAT for works completed for the Dorchester Grill. The invoice is endorsed with manuscript notes stating that on account payments were made in the sums of £40,000 on 11 August and £10,000 on 10 September 2014;

xii)
Mr Kilker exhibited three pages of manuscript notes which he says were compiled during a meeting with Mr Purton towards the end of July. It has a number of entries with figures against them. At the end of the document appears the figure "£350k", though it is not clear on the face of the document how that figure was reached;

xiii)
On 18 August 2014 Mr Wall on behalf of Mr Purton sent Mr Purton's Application No 3 which adopted the format of the template that had been provided on 18 July. The differences between the template sent to Mr Purton on 18 July and this Application are significant:

a)
The 13 items listed in the left hand column under "Original Contract Works" are the same in each document, except for Item 3 under the sub-heading "Joinery Manufacture", which was described as "Moveable Wall Panels" in the original template and as "Day & Night Panels" in Application No 3;

b)
10 of Total Values ascribed to the 13 items listed under "Original Contract Works" are different. Specifically, the sum of the 13 Total Values in Mr Purton's Application No 3 is £350,000 (as opposed to

£550,000 in the original template). The biggest difference is that £110,000 has been moved from Item 3 of Joinery Manufacture (Moveable Wall Panels), apparently to Item 6 of Additional Works/Variations (now called Benbow Moveable Wall Panels). So it appears that the new Item 3 (Day & Night Panels) in Application No 3 is in substitution for the old one, which has moved down to Additional Works/ Variations;

c)
Items 3-8 of the 9 items now listed as Additional Works/Variations are described by reference to names: the Court was told that this reflects the fact that the items were packages to be provided by named sub-contractors;

d)
The aggregate Total Value for all the items in the left hand column in Application No 3 was £673,000 (up from £592,000 in the original template);

e)
The valuation was in the sum of £320,300 (as opposed to £200,000 in the original template);

xiv)
Application No 3 was revised slightly by another in essentially the same format on 19 August 2014. The differences are not material, save that the aggregate Total Value for all the items in the left hand column was now £676,200 and the current valuation was now £323,500, both figures having increased by £3,200;

xv)
On 21 August 2014 Mr Purton sent to Kilker what he described as “the payment sheet I am running on”. Attached was a document outlining costs incurred (paid or due) of £356,328 and payments received to date of £261,665, leaving a balance of £94,663. At the bottom of the document it stated “NB We are aiming for a contract price of £600,000 with £50,000 aborted costs”;

xvi)
On 15 September 2014, Mr Wall on behalf of Mr Purton sent another document in the same format as Valuation No 3 described in his email and on the spreadsheet as a “Running Total”: The 13 items under the heading “Original Contract Works remained unchanged with Total Values of £350,000 in aggregate;

xvii)
On 18 September 2014 Mr Jennings of Kilker sent an email in which he said that Mr Purton’s “application figure for works complete to 21st August 2014 was £323,500 & VAT and to date we have paid you £353,555 & VAT.” It is not clear what the source of the figure of £323,500 is, though it coincides with the figure for the revised Valuation No 3 sent on 19 August 2014;

xviii)
Mr Purton made applications for payment on 22 September 2014, 24 September 2014 and 5 October 2014, which were endorsed as being paid on 23 September, 29 September and 10 October respectively. Their combined value was £145,000 including VAT. A further invoice on 15 October for £96,000 gross was endorsed as paid in full the same day. One dated 29 October 2014 for £60,000 gross was paid in two instalments on 28 and 30 October 2014. Another for £60k gross dated 3 November 2014 was endorsed as paid in instalments on 7 and 11 November 2014. Thereafter Applications for payment do not appear to have been paid;

xix)
There is a version of the 18 July 2014 Template described as Running Total at 15 October 2014 which includes a sum of £400,000 as the subtotal for the original contract works. Mr Purton says in evidence that this figure was an inadvertent mistake. In fact, the increase from £350,000 to £400,000 can be seen to be attributable to increasing two items of preliminaries (Drawing Preparation and Project Management) by £25,000 each.

xx)
On 8 December 2014 Mr Purton submitted his final account using the 18 July Template, and stating that the Original Contract Works were £350,000. The two additional sums of £25,000 for preliminaries had been removed and now appeared as separate items under Additional Works/Variations. The final account also constituted a request for payment in the sum of £147,223 i.e. the sum awarded by the adjudicator and the main subject matter of this action.

15.
Kilker had previously sent Mr Purton its estimate of the final account in a lower overall figure. But when Mr Purton submitted his final account, Kilker did not respond with a pay less notice pursuant to s. 111(3) of the Act. It was on that basis that the adjudicator decided that Kilker was obliged to pay Mr Purton the sum claimed within 7 days of his decision. Provided he had jurisdiction, he was technically correct to do so.

16.
One further point arises on the adjudicator's decision. He dealt with Kilker's challenge to his jurisdiction at [8]-[13]. In setting out the material facts, he recorded that Kilker had written to him on 11 February 2015 asserting that the wrong party had referred the dispute to him. That was an error: he was not nominated until 17 March 2015. The letter of 11 February 2015 was written to his predecessor and formed the basis for his decision to resign: see [3] above. Kilker had submitted witness statements to the present adjudicator in which they took the point now taken, namely that there was no contract with Mr Purton, not on the basis that Mr Purton was the wrong contracting party but that there was simply no legally binding agreement.

Application of Principles to the Present Case

17.
Kilker's first submission is that the court cannot be sure to the standard required for a summary judgment application that there was any contract in existence. If that is right, the adjudicator would not have had jurisdiction as the right to refer a dispute to adjudication is dependent upon the existence of a construction contract: see s. 108(1) of the Act. Kilker points to the denial of any agreement in Mr Kilker's witness statements and the documents to which I have referred above where Mr Purton said either that the contract price was to be agreed or that he was working to a budget or both: see [14 (vii), (x), and (xvi)].

18.
To my mind it seems clear beyond argument that there was a contract. There was substantial "performance" on both sides, with Mr Purton doing the works and Kilker making payments to the tune of £654,000. While it is theoretically possible for parties to carry out works and to receive payments without having entered into a legally binding agreement, it is unrealistic to suggest that is what happened here, for the following reasons:

i)

On 18 July 2014 Mr Jennings, who is evidently one of Kilker's key employees, sent the template with the acknowledgement that "the figures [he had put in] will alter to reflect the agreements between yourself and [Mr Kilker]" and asked that Mr Purton submit it including "the original agreed contract value" and "the agreed costs of variations to the original scope of works." This, for present purposes, is a clear acknowledgement that there was an agreed original scope of works with an agreed contract value, which was to be supplemented by variations thereafter;

ii)
With one exception, the subsequent iterations of the template produced by Mr Purton or on his behalf all identified the same original scope of works and the price for them as £350,000. The exception is the version described as the Running Total at 15 October 2014 which has £400,000 in place of the £350,000. On examination it is clear that the additional £50,000 is attributable to increased preliminaries because of additional works over and above the Original Contract Works, and the correction to that effect in Mr Purton's Final Account document is logical and supports his case: see [14(xx)].

iii)
The references to budgets and an overall contact price other than £350,000 are not inconsistent with Mr Purton's case. They are evidently referring to the final out-turn cost of all works i.e. what had been consistently described by Kilker (in the 18 July 2014 template) and Mr Purton as the "Original Contract Works" plus any other Additional Works/Variations.

19.
As a means of testing the proposition that there was or may have been no contract, it is instructive to ask what would have happened if Mr Purton had said to Kilker in early or mid-September that he declined to attend on site and install the works. In my judgment he would have got a dusty reply, and rightly so. Kilker needed the assurance of Mr Purton's future performance just as Mr Purton needed the assurance of Kilker's future payments. On the non-controversial facts of this case, to suggest that what was happening was merely a series of ad hoc works on the part of Mr Purton for which Kilker paid without being under a contractual obligation to do so stretches the imagination further than it should reasonably be required to go.

20.
I bear in mind Lord Clarke's salutary reminder in RTS that it does not necessarily follow from the fact that work was performed that the parties must have entered into a contract. Looking at all the circumstances of the case, including the material fact of performance, it is unrealistic to suggest that the parties either did not or may not have intended to enter into legal relations.

21.
Kilker's fallback position, as introduced and developed in oral submissions, was that it was necessary for the Court to be satisfied to the requisite standard for awarding summary judgment that, if a contract existed, it was the contract alleged by Mr Purton. The submission was that if the Court was not so satisfied, then Mr Purton should not be permitted to rely upon a contract that was not pleaded in these proceedings and, furthermore, the adjudicator would have had no jurisdiction to decide the issue referred to him. Mr Selby submitted that, if the court was not satisfied that there was a contract made on or about week commencing 9 June 2014 for the joinery package at the Dorchester Grill for a price of £350,000 and that the contract was subsequently varied in value, quantity and quality, then Mr Purton would be approbating and reprobating if he were permitted now to rely upon another contract. The high point of his submission was that if any element of the contract alleged by Mr

Purton was not established to the summary judgment standard of certainty, then judgment should be denied. Thus, he submitted, if the Court were certain that a contract was concluded generally as alleged but (a) it was not concluded "on or about" 9 June 2014 or (b) it was not concluded for the specific scope of works now alleged, or (c) it was not concluded for the sum of £350,000 (e.g. because it was on a quantum meruit basis), or (d) it was concluded with any combination of the features outlined at (a) to (c), then the referral to adjudication was impermissible, the adjudicator did not have jurisdiction and the Court should not entertain the application for summary judgment. He supported his argument by reference to the words of s. 108(1) – "A party to a construction contract has the right to refer a dispute arising under the contract for adjudication ...." – which he submitted meant that the reference to adjudication must correctly identify the contract, to which the referrer is a party and under which the dispute arises, in all material particulars.

22.
In order to address this submission it is necessary first to distinguish between a case where a contract is relied upon but is incorrectly identified in one or more particular respects, and a case where it can be said that the contract relied upon never existed or that the dispute being referred did not arise under the contract relied upon.

23.
The first of these alternatives can be addressed shortly. The jurisdiction to refer is dependent upon the existence of a construction contract and a dispute arising under it. It is not dependent upon identifying each and every term with complete accuracy so that the process of referral becomes a formalistic obstacle course akin to 18th century forms of action, where one slip may put a party literally out of court. Bearing in mind the intention that the adjudication system should provide quick and effective remedies for contracting parties, equally accessible to those who are legally represented and to those who are not, an approach which deprived adjudicators of jurisdiction where a dispute has been referred that has arisen under a construction contract because of any error in its characterisation, would as a matter of legal policy be unacceptable.

24.
Taking the second alternative, a situation could arise where the referral asserts that a dispute has arisen under Contract A, but it is shown that Contract A does not exist and there was no contract. This, in essence, was Kilker's primary position in the present case and I have rejected it on the facts, although it is common ground (and I agree) that if there is no construction contract, there is no jurisdiction under s. 108(1) of the Act. There is, however, an intermediate position between there being no contract at all and there being a contract which is alleged but mis-described in some respect or respects by the Claimant, so that it can be said that the contract as described is not the contract under which the dispute arose but is (or would be) another contract altogether.

25.
It is in this intermediate case that Mr Selby's submission about approbating and reprobating requires closer attention. He founds it upon the decision of the Court of Appeal in Banque Des Marchands de Moscou v Kindersley[1951] Ch 112 where Lord Evershed MR (with whom Singleton and Jenkins LJJ agreed) said:

"The phrases "approbating and reprobating" or "blowing hot and blowing cold" are expressive and useful, but if they are used to signify a valid answer to a claim or allegation they must be defined. Otherwise the claim or allegation would be liable to be rejected on the mere ground that the conduct of the party making it was regarded by the court as unmeritorious. From the authorities cited to us it

seems to me to be clear that these phrases must be taken to express, first, that the party in question is to be treated as having made an election from which he cannot resile, and, second, that he will not be regarded, at least in a case such as the present, as having so elected unless he has taken a benefit under or arising out of the course of conduct which he has first pursued and with which his present action is inconsistent."

26.
In Redworth Construction Ltd v Brookdale Healthcare Ltd [2006] BLR 366, the Claimant applied to enforce the decision of an adjudicator. The referral relied upon a construction contract which was alleged to have incorporated the terms of the JCT Standard Form of Building Contract with Contactor's Design 1998. The adjudicator made a non-binding decision on jurisdiction finding that the JCT Terms were incorporated and that he had jurisdiction. HHJ Havery QC decided that the JCT Terms were not part of the contract and, on that basis, dismissed the claim to enforce the award. He held that the Claimant was not entitled to go beyond the matters it had relied upon before the adjudicator because that would involve him in approbating and reprobating in a manner that was impermissible. HHJ Havery QC held that the Banque des Marchands principle to which I have referred above was applicable because the claimant had obtained the benefit of the adjudicator's decision by relying upon the incorporation of the JCT Terms; that was held to have been an election which had led to both jurisdictional and substantive benefits. In the course of his reasoning he stated (at [38]) that:

"… in these proceedings I cannot consider the merits of the adjudicator's substantive decision. In those circumstances, it is not appropriate (and in some circumstances it might be impossible) for the court to guess what decision would have reached if a different argument had been presented to him."

27.
In a later decision, Akenhead J in Nickleby FM Ltd v Somerfield Stores Ltd [2010] EWHC 1976 (TCC) was confronted by a similar issue. There had been an original contract in writing and the Claimant submitted to the adjudicator that it had been extended. The contract as extended was alleged by the Claimant to give the adjudicator jurisdiction. Subsequently, documents came to light which cast doubt upon the Claimant's submission that the contract had been extended. The issue before the Court was whether the Claimant was entitled in enforcement proceedings to rely upon a factual case that differed from that advanced before the adjudicator. Akenhead J said that it could. Of most relevance to the present case, he said:

"[26] There is no issue in this case that the contract was a construction contract for the purposes of the 1996 Act (subject to a possible issue as to whether all the terms were in or evidenced in writing) or that, because no provision was made in the contract for adjudication, the statutory Scheme for Construction Contracts (as set out in the Schedule to the Scheme for Construction Contracts (England and Wales) Regulations 1998, SI 1998/649) is applicable."

He expressed doubt about the correctness of the Redworth decision as follows:

"[28] I find myself in some disagreement. The Banque des Marchands de Moscou case was to do with two sets of court proceedings and is readily comprehensible in that context. However, an adjudicator, who reaches what is expressed and accepted by him and the parties as a non-binding decision, has only inquired into his jurisdiction as he was entitled to do and it is primarily in the court that a binding decision can be given as to jurisdiction. I can not see that principles of election apply in these circumstances. Of course, if a respondent to adjudication does not challenge the jurisdiction of the adjudicator during the adjudication when it knows of the grounds of challenge, it will generally be deemed to have waived or abandoned any rights to challenge the jurisdiction on those grounds. That

however is not in strict terms election. Whether the Redworth Construction decision was rightly decided or not on this point, one needs to examine in any event with care whether a materially different case on jurisdiction is being mounted in the court proceedings compared with that raised before the adjudicator. It must also be relevant to consider whether at least in a clear case the adjudicator with the correct and full information before him would have reached the same conclusion that he did. It will also be relevant to consider whether the adjudicator in fact and in reality actually did have jurisdiction. If he or she did have jurisdiction to decide the dispute referred to adjudication, and if he or she with the full information available would have inevitably concluded that there was jurisdiction, I can not see why the adjudication decision should not be enforced in those circumstances."

28.
I respectfully agree with the reasoning of Akenhead J in these passages. At least in a case where there can be no doubt that the adjudicator, if properly informed, should and would have concluded that he had jurisdiction and the proper basis of jurisdiction does not make a difference to the substantive outcome, the Court should not shut out a Claimant who comes to the court to enforce the adjudicator's decision. There are two reasons for this conclusion, one based on principle and one on pragmatism. In principle, if the adjudicator as a matter of fact had jurisdiction and came to an unimpeachable substantive conclusion which is not affected by the correctly-understood route to jurisdiction, the Claimant has not secured a benefit by his choice of the wrong route to that end since the outcome is unaffected. One of the pre-requisites identified by Lord Evershed MR is therefore lacking. The pragmatic reason is that to hold otherwise would encourage the taking of points which, while technically fascinating, are entirely lacking in merit and inimical to the spirit of the adjudication scheme as a whole.

29.
In the present case I remind myself that it would be wrong in principle to conduct a mini-trial and that I am confronted by a conflict of witness evidence about whether a contract was concluded on or about 9 June 2014 as Mr Purton has consistently maintained. I am satisfied to the requisite standard that there was a contract between the parties, for the reasons outlined above. While the contrary is arguable, I think it highly probable that Mr Purton would establish at trial that his characterisation of the contract is correct. I would be slow to conclude that Kilker has "no real prospect" of showing that his characterisation of the contract is wrong in one or more respects. However, that is not the decisive issue.

30.
What matters is whether Kilker has reasonable prospects of successfully defending the claim. On that, I have come to the conclusion that it does not. My starting point is to look at the adjudicator's substantive decision, which he reached on the basis that Mr Purton's case on the existence of a construction contract was correct. He held that the adjudication provisions of the Act and the Scheme applied; that Mr Purton's final account application on 8 December 2014 met the requirements of s. 110A(3) of the Act and that no payment notice or pay less notice was given by Kilker in response to that notice. On that basis the matter fell within s. 111(2)(c) of the Act and therefore Kilker was obliged to pay Mr Purton the sum of £147,223.00 within seven days. Kilker recognises that, assuming that the adjudicator's analysis and decision on jurisdiction was correct, it cannot challenge his substantive reasoning.

31.

Redwood and Nickleby were both decided when the adjudication regime required writing to establish jurisdiction. That is no longer necessary. My conclusion that there was a contract between the parties leads inevitably to the conclusion that it was a construction contract for the purposes of the Act. That would be sufficient to found jurisdiction. Kilker has not identified any variant of the contract that I have found certainly to have existed which would affect the outcome of the adjudicator's substantive decision. Any contract that has been contemplated would have brought the Scheme into play. Once the Scheme is in play, the adjudicator's substantive reasoning applies and is unimpeachable.

32.
Therefore, whether the contract was precisely in the terms alleged by Mr Purton or differed from it in one or more respects, the basis of jurisdiction does not affect the applicability of the Scheme or the substantive outcome. That being so, in my judgment, no question of approbation and reprobation arises. I recognise that there could be a case where the choice of route to jurisdiction might affect the rules that applied to the adjudication or the choice of adjudicator. That is not this case and I do not comment on or prejudge what the correct result would be if such a case arose.

Conclusion

33.
For these reasons I conclude that the Claimant is entitled to summary judgment in the sum of £151,407.00 plus interest at the rate of 8% from 19 May 2015 to date and continuing at the Judgment rate until payment or further order and to its costs of the action to be assessed on the standard basis if not agreed. I note that the sum of £147,223 claimed in the adjudication and these proceedings was the figure that was owing net of VAT. I have heard no submissions on the recoverability of the VAT element but direct that the parties shall discuss and, if possible, agree the terms of any consequential orders relating to VAT or otherwise.